UNITED NATIONS

ECONOMIC AND SOCIAL COUNCIL

Distr.
GENERAL

E/CN.4/1985/26/Add.4
16 October 1984

ENGLISH
Original: FRENCH

COMMISSION ON HUMAN RIGHTS
Forty-first session
Item 16 of the provisional agenda

IMPLEMENTATION OF THE INTERNATIONAL CONVENTION ON THE SUPPRESSION AND PUNISHMENT OF THE CRIME OF APARTHEID

Reports submitted by States parties under article VII of the Convention

Addendum

MADAGASCAR 1/

[20 September 1984]

The International Convention on the Suppression and Punishment of the Crime of Apartheid was ratified by the Democratic Republic of Madagascar under Order No. 77-011, of 31 April 1977, in the same way as many other international conventions relating to human rights.

Madagascar is a democratic country by tradition (Fokolona), where fihavanana (extended kinship) and hospitality are the rule, where eminence lies solely in age, experience and virtue (ny fanany no maha-olona). Hence it was natural for Madagascar to be among the first countries to ratify the International Convention on the Suppression and Punishment of the Crime of Apartheid.

As in its earlier reports under article VII of the Convention, the Democratic Republic of Madagascar cannot fail to point out once again that it has always resolutely condemned the policy of apartheid and it proscribes all forms of discrimination as factors inimical to national unity and independence and to international peace and security.

For example, article 6 of the Constitution, of 31 December 1975, affirms that the law is an expression of the will of the people. The law is the same for all, whether it protects, imposes obligations or punishes.

1/ The initial report submitted by the Government of Madagascar (E/CN.4/1277/Add.13) was considered by the Group of Three at its 1979 session.

Article 12 provides that the State shall ensure the equality of all citizens by:

"...

Proscribing all discrimination based on race, origin, religious creed, level of education, wealth or sex".

These principles of the Constitution take material form in a number of laws, including:

Penal Code, article 115 (Act No.82-013, of 1 June 1982):

"Anyone who, because of a person's origin, colour, sex, family situation, actual or presumed membership or non-membership of a particular ethnic group, nation, race or religion, has knowingly denied that person the enjoyment of a right to which that person is entitled, shall be liable to imprisonment for a period of one month to one year or to a fine of 50,000 to 250,000 francs, or both.

The above penalties shall be doubled if the offences have been committed by a public official or by a citizen in charge of a public ministry in the exercise of or in connection with his functions.

In the cases referred to in the two preceding paragraphs, if the perpetrator of the offence proves that he has acted on the order of his superiors in matters coming within their competence and in which he had to comply with their orders as his superiors, only the superior officers having issued the order shall be liable to the corresponding penalties".

Penal Code, article 59:

"Accomplices in a crime or an offence shall be liable to the same penalty as the persons committing the crime or offence, except where otherwise specified by law".

Similarly, Order No. 62-041, of 19 September 1962, relating to the general provisions of domestic law and private international law, stipulates in:

Article 17: "The rights of the individual are inalienable".

Article 18: "Any unlawful act in breach of the rights of the individual shall entitle the individual concerned to demand termination of the act, without prejudice to any liability on the part of the perpetrator of the act".

Article 19: "A Malagasy national or an alien may be deprived of the exercise of his civil and family rights only by a decision of the courts, under the conditions specified by the law".

Article 20: "An alien in Madagascar shall enjoy the same rights as Malagasy nationals, with the exception of those which are expressly denied to him by law...".

Sometimes, the Constitution and Malagasy law may not make provision for a right or a prohibition set forth in an international covenant or convention.

Here again, however, opportunities exist for the Malagasy courts to apply the international rules relating to human rights:

Article 11 of Order No. 62-041:

"No judge may on any pretext whatsoever refuse to hear a dispute brought before him; in the event of silence, inadequacy or obscurity in the law, the judge may draw on the general principles of law and, where necessary, the customs and traditions of the parties in dispute, provided such customs and conditions are definitely and properly established and do not run counter in any way to public order and morality".

Similarly, article 13 of the Order states that:

"The general principles enunciated in the Preamble to the Constitution of the Malagasy Republic must be observed by judges, who shall in every case ensure respect for and observance thereof under the law in force".

The Preamble sets forth, among other principles: abolition of the exploitation of man by man and of all resulting forms of domination, oppression and alienation; the inherent dignity of the individual; and the freeing of every person and of all mankind.

But here again, under a recent Order, No. 82-019 of 11 August 1982, it is possible to quash a ruling which does not in any way breach (positive) law yet is a breach of the general precepts of justice and equity.

Article 11 of Order No. 82-019:

"... an appeal to vacate a judgement in the interest of the law is admissible in the event of a breach of the general precepts of justice, and particularly the principles of equity, when the judgement in dispute necessarily involves a provision of the law as objective justification therefor".

No case law on the application of this article can be cited as yet, but it is a certainty that, if the appeal judge finds support for his ruling in the principles set forth in international covenants or international conventions, nothing can prevent him from taking account of them as part of the general principles of justice.

Again, the question of extradition is governed by the Act of 10 March 1927 - articles 30 and 509 of the Code of Criminal Procedure.

The Democratic Republic of Madagascar attaches particular importance to the struggle being waged to eliminate racism, racial discrimination and apartheid. Madagascar, together with all justice- and freedom-loving countries throughout the world, celebrates every year the days organized to mark solidarity with the political prisoners in South Africa and to commemorate the events at Soweto, Sharpesville and so on.

The press, radio and television regularly inform the Malagasy people of the inhuman conditions experienced by our brethren in southern Africa. Moreover, the African National Congress (ANC) has a permanent bureau in Madagascar and its task will be more clearly defined by the ministries directly concerned.

As to the importance and the nature of the role played by multinational corporations in maintaining the system of apartheid in southern Africa, the Department of Justice is less qualified than others to give its views on this matter.

At the very most, it would point out that too many economic and strategic interests are at stake (mining resources, strategic products, cheap labour, etc.), and to such an extent that unanimity about securing the complete liberation of the peoples of southern Africa still has a long way to go. Yet liberation is the sine qua non if these countries are to escape from the aberrant system of apartheid and freely enjoy the right to self-determination and to their own wealth and natural resources.

Annex I

NOTE

Concerning the draft Convention on the Establishment of an International Penal Tribunal for the Suppression and Punishment of the Crime of Apartheid and Other International Crimes

Since domestic Malagasy legislation already provides for the punishment of the acts embodied in the definition of apartheid in accordance with article II of the anti-apartheid Convention (cf. document E/CN.4/1426, para. 13), including attacks on the physical security of the individual, murder and torture, or discriminatory activities as covered by article 115 of the Penal Code, it may be stated that the spirit of the draft Convention on the Establishment of an International Penal Tribunal for the Suppression and Punishment of the Crime of Apartheid and Other International Crimes would in no way run counter to the Malagasy legal order.

Madagascar has acceded to all the fundamental instruments relating to human rights, in particular the International Covenants formulated by the United Nations in the context of the Universal Declaration of Human Rights of 10 December 1948, including the International Covenant on Civil and Political Rights. The latter instrument was ratified by the Malagasy Parliament by Act No. 70-001 of 23 June 1970 (JORM of 27 June 1970, p. 1348), together with the Optional Protocol thereto.

Subsequently, the General Assembly of the United Nations adopted a number of conventions relating to the protection of the specific rights of minorities or a particular category of the human community (workers, women, refugees, etc.). Madagascar has acceded to these conventions, which include:

The International Convention on the Elimination of All Forms of Racial Discrimination, adopted in New York on 7 March 1966 (Act No. 58-021 of 17 December 1968, JORM of 21 December 1968, p. 2387);

The International Convention on the Suppression and Punishment of the Crime of Apartheid (Order No. 77-011 of 13 April 1977, JORM of 23 April 1977, p. 967.

Given this situation and in view of the fact that the approach adopted in contemporary international criminal law is that of the "indirect enforcement model", in other words, States assume certain duties through their national systems, it is quite clear that the effectiveness of the international systems established will depend on the genuine will of States parties with regard to their functioning.

Nevertheless, the following observations would appear to be necessary concerning the draft Convention.

PART II. THE PENAL PROCESSES OF THE TRIBUNAL

Article 8 (page 23)

Initiation of process

Paragraphs 2 and 4: If the Procuracy decides to continue further investigation, how will it operate? Will it travel to the State concerned or will it delegate its powers to a national jurisdictional body? In short, what will its modus operandi be? (cf., however, the observation at the end of the second paragraph on page 46).

In addition, how will the Investigative Division determine that a communication is "manifestly unfounded" or not? Will this be a sovereign unappealable decision?

Paragraph 6: What are the criteria for prosecution? In short, it would appear to be necessary to formulate a procedure in this area.

PART IV. TRIBUNAL STANDARDS

Article 19 (page 30)

Standards for rules and procedures

Paragraph 1 (f) (4): What are the "critical" stages at which counsel for the accused will be allowed to be present?

PART V. PRINCIPLES OF ACCOUNTABILITY (PROVISIONS IN THE NATURE OF A GENERAL PART)

Article 25 (page 39)

Exoneration

Paragraph 8 (b): If a person already tried by the national courts of a State party can be retried for the same conduct by the International Court, can one still speak of double jeopardy?

Would this not amount to censure of the decisions of the national courts on the conduct in question? This raises a delicate problem of national sovereignty which may encounter resistance by States parties, with regard to both the co-operation to be extended in the conduct of prosecution proceedings and the execution of adjudications.

In the latter case, would not the execution of sentences in the offender's country of origin but under the jurisdiction of the International Penal Tribunal (art. 31) constitute continuing and indiscreet supervision of the prison system of a sovereign State?